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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 21 ~~649~~.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

DAVID H. LEAKE,
WILLIAM G. WISE,
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(33,928)

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OCTOBER TERM, 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

JURISDICTION OF THIS COURT.

In the brief for respondent, filed herein, the jurisdiction of this court under section 237 of Judicial Code, as amended by Act of February 13, 1925, is attacked upon the ground that the petitioner did not exhaust its remedy under local law, in that it failed to make application to the Appellate Court for a certificate of importance and an appeal as provided for in subdivision (1) of sec. 121, ch. 110, Cahill's Rev. St. of Ill., 1927. (See appendix to petition.)

Subdivision (2) of that Statute provides that, as to applicable cases—such as here—the Supreme Court may require "any such case to be certified * * * for its review and determination *with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court.*" (Italics supplied.)

The method of review, set out in subdivision (2), is an alternative one giving the "same power and authority" and having "like effect as if it had been carried by appeal or writ of error to the Supreme Court"—obviously including the appeal provided for in subdivision (1). Compare *Rizzo* v. *Catholic Order of Foresters,* 274 Ill. 91, 113 N. E. 104 (construing earlier act). It is clear, therefore, that the cases cited on page 3 of the opposing brief are not pertinent here.

Petitioner is advised that in *Minn. etc. R. Co.* v. *Rock,* —— U. S. ——, No. 454, Oct. Term, 1928, an Illinois case, a writ of certiorari was granted by this court in the face of a jurisdictional attack made upon this very ground.

ASSIGNMENT OF ERRORS IN APPELLATE COURT

It is objected that there was no assignment of errors filed by petitioner in the Appellate Court.

That there was such an assignment, agreeable to state practice, is shown by the judgment of the court (R. 2) and the opinion (R. 5). It is shown in the record (R. 224) though the caption "In the Supreme Court of Illinois" is erroneous, due doubtless to a typographical error. The assignment of errors in the Supreme Court of Illinois appears elsewhere (R. 3). In any event, in

view of the Appellate Court's consideration of the case, this objection is not tenable here.

Campbell v. *Olney,* 262 U. S. 352, 354;
Hartford Life Ins. Co. v. *Johnson,* 249 U. S. 490, 492, 493 (cited in opposing brief, p. 6).

ASSUMPTION OF RISK.

It is argued that the defense of assumption risk is not subject to review here since it was not assigned as error in either the Appellate Court or the Supreme Court.

This is a mistaken view since clearly the assignments in both the Appellate and Supreme Courts below are broad enough to cover that defense (R. 3,224).

That it was made an issue in the case is shown by the instructions (R. 219) and, while the argument for petitioner made in the Appellate Court does not appear in the record, the defense of assumption of risk was pressed in the petition for writ of certiorari presented to the Supreme Court of Illinois. (R. 23-25.)

Furthermore, under the facts here, saying that the employe assumed the risk is but another way of saying the petitioner was not negligent.

Missouri Pac. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Tuttle v. *Detroit, etc. R. Co.,* 122 U. S. 189, 195.
See: 3 Labbatt's Master & Servant (2nd Ed.), p. 3094; also pages 2487-2488.

QUESTIONS OF FACT.

The facts are believed to be fairly stated in the petition.

(1) In so far as respondent's brief undertakes to assert that there was evidence of a custom to notify persons other that those unloading cars of a switching movement such as here, and liable to be affected by it,

the assertion is not believed to be supported by the record. (R. 60, 64, 73, 90, 166, 167.)

And so it was found by the Appellate Court (R. 9)—

> "that it was the uniform custom to *notify persons unloading at this point* whenever the defendant was to run cars in and upon said track." (Italics supplied.)

The point, upon which the case turned in the lower courts, was the conclusion (believed to be erroneous) that this custom enured to the benefit of Mihas, although he was not within the class of persons intended to be protected thereby. (R. 10, 11, 12.)

(2) It is said in the opposing brief that team track No. 3 was "customarily filled with standing cars at the time each morning when respondent was required to go to the place aforesaid to get his speeder car," (Opp. br. p. 8; also p. 11)—the inference being that Mihas customarily crossed over or between cars on this track at a regular time.

But the evidence was that the tracks were not always filled with cars (R. 98) and furthermore that Mihas had no regular time for crossing the tracks in going to his work (R. 91, 119).

(3) It is said that the cars were shunted at an unreasonable and excessive rate of speed and that an ordinary switching movement at a reasonable and proper rate of speed—

> "obviously would not—or at least may not—have thrown respondent between the cars * * * * * *."

(Op. br. p. 10).

It is true the Appellate Court found that the shunted cars "must have proceeded over the track on the team track at a considerable speed so that they struck the standing cars with a great deal more force than was requisite under the circumstances" (R. 10)—but there was no finding that this was the proximate cause of the injury to Mihas nor was liability predicated in anyway thereon.

While there was evidence that the impact of the moving upon the standing cars was quite severe (R. 71, 80) there was also evidence that the cars were shunted in at no greater speed than usual in making a switching movement of that character (R. 177, 196, 198). Nor was there any evidence that the mere violence of the impact was the proximate cause of the injury to Mihas.

At best this is a mere speculation or conjecture which is insufficient. *Chicago, etc. R. Co.* v. *Coogan,* 271 U. S. 472.

But, as pointed out in the brief in support of the petition (p. 13), even admitting otherwise, that fact would not constitute, as to Mihas, negligence of which he could complain.

See, also, *Chicago, etc. R. Co.* v. *Elliott,* 55 Fed. 949, 952, 953.

Respectfully submitted,

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